

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

No. 77-4057

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067, 77-4068, 77-4073, 77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
v. *Petitioners,*

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents,

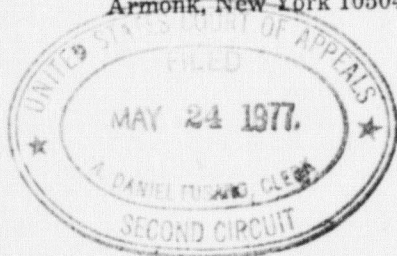
INTERNATIONAL BUSINESS MACHINES CORPORATION, et al.
Intervenors.

On Petitions for Review of an Order of the
Federal Communications Commission

**BRIEF FOR INTERNATIONAL
BUSINESS MACHINES CORPORATION
AS INTERVENOR**

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BRIEF FOR INTERNATIONAL
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QUESTIONS PRESENTED

In a rulemaking proceeding, after three rounds of written comments and extensive petitions for reconsideration involving at least 43 parties, the Federal Communications Commission ("Commission") ruled that communications common carriers should not be allowed to prohibit or restrict the resale or sharing of their transmission services. Petitioners in these cases challenge that ruling on a number of grounds.

This Brief discusses the following questions:

1. Was it unlawful for the Commission to issue this ruling without conducting trial-type hearings?
2. Was the Commission's ruling arbitrary, capricious, or an abuse of discretion?

REFERENCE TO RULING

The ruling of the Commission under review in this case is contained in a Report and Order in *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976) ("Initial Order"), as modified by a Memorandum Opinion and Order on reconsideration in the same matter, reported at 62 F.C.C.2d 588 (1977) ("Order on Reconsideration").¹

STATUTES INVOLVED

The following statutes involved in this proceeding are quoted in relevant part in Appendix A, attached: Section 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a); and Sections 553, 556, 557, and 706 of the Administrative Procedure Act, as amended, 5 U.S.C. §§ 553, 556, 557, and 706.

STATEMENT OF THE CASE

These consolidated cases involve six petitions to review the Commission's *Initial Order*, as modified by its *Order on Reconsideration*, in its rulemaking proceeding concerning the resale and shared use of communications common carrier services. International Business Machines Corporation ("IBM") files this Brief as an in-

¹ These orders are reproduced in the Joint Appendix ("J.A.") beginning at I J.A. 28 and 152, respectively.

tervenor in support of respondent Federal Communications Commission in five of these consolidated cases.²

the challenged orders, the Commission ruled that reasonable and unlawfully discriminatory for communications common carriers to prohibit or restrict the or sharing of their transmission services by their customers. The Commission required that the tariff provisions containing the unlawful restrictions be eliminated.³ The petitioners in these cases (other than IBM) seek to upset that policy determination on various grounds and in varying degrees.⁴

The Decision of the Commission

In 1974, the Commission began a rulemaking proceeding concerning the resale and sharing of communications services.⁵ *Notice of Inquiry and Proposed Rulemaking*,

² These five cases are Nos. 77-4057, 77-4068, 77-4073, 77-4074, and 77-4075. IBM is the petitioner in the sixth case, No. 77-4067, and filed a brief as petitioner in that case. See note 8 *infra*.

³ *Initial Order*, 60 F.C.C.2d at 322, 1 J.A. 109. The carriers filed new tariff provisions in late March, 1977. On April 18, 1977, American Telephone & Telegraph Company filed a petition to investigate and suspend 14 of these revised tariffs.

⁴ The brief filed in this Court by Aeronautical Radio, Inc. ("ARINC") and the Air Transport Association of America, petitioners in No. 77-4075, does not appear to challenge the Commission's basic conclusion that restrictions on resale and sharing should be removed. It challenges only the Commission's conclusion that the previous "single customer" tariff provisions, under which ARINC and other selected customers were allowed to share private line services, were unlawfully discriminatory. The Commission found that those tariff provisions were not justified either by competitive necessity or by the statutory objective of promoting the "safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151. See Appendix E, "Single Customer Provisions," *Initial Order*, 60 F.C.C.2d at 330-36, 1 J.A. 127-40.

⁵ This proceeding grew out of and effectively continued three other matters that were pending before the Commission: a complaint filed by American Trucking Association, Inc. against Ameri-

47 F.C.C.2d 644 (1974), I J.A. 12. The Commission's *Notice* established a schedule of three rounds of written comments on two questions: (1), whether subscribers to private line communications common carrier services⁶ should be free to resell or share those services; and (2) if so, whether and to what extent the Commission should regulate such resale and shared use.⁷

In response to the *Notice*, the Commission received formal written comments from a total of 43 parties. Thirty-nine parties submitted initial comments, 36 parties submitted reply comments, and 23 parties submitted response comments. All comments and reply comments were served on all persons who expressed an intent to participate. The parties' submissions totalled more than 4,300 pages.

After considering the three rounds of comments, the Commission issued its *Initial Order*, declaring that no carrier providing private line communications services

can Telephone & Telegraph Company for refusal to provide it "single customer" status (Docket 19746); a petition for rulemaking filed by Microwave Communications, Inc. requesting the adoption of procedures to monitor private line sharing arrangements (RM-1997); and a petition for rulemaking filed by Western Union Telegraph Co. requesting a proceeding to resolve certain public interest questions before certifying further resale entities (RM-2218). The Commission also noted that this proceeding was to some extent precipitated by questions raised in its certification of three resale entities as common carriers. *Initial Order*, 60 F.C.C.2d at 268, I J.A. 37-38. See *Packet Communications, Inc.*, 13 F.C.C.2d 922 (1973); *Graphnet Systems, Inc.*, 44 F.C.C.2d 800 (1974); *Telenet Communications Corp.*, 46 F.C.C.2d 680 (1974).

⁶ Private line services typically provide the subscriber with the equivalent of full-time lines between any two or more designated locations. The line charges are typically based on the number of points served and the distance between them and, as such, are insensitive to volume of usage. Users of such services are primarily government agencies and businesses that have a high volume of communications between two, or among several, specified points.

⁷ See *Initial Order*, 60 F.C.C.2d at 276-80, I J.A. 48-53.

either now or in the future could impose tariff restrictions on resale and sharing.⁸ The Commission decided that further comments or other proceedings were not necessary to the resolution of the policy issues before it.

In extensive petitions for reconsideration filed with the Commission, American Telephone and Telegraph Company ("AT&T") and other parties challenged the conclusion of the *Initial Order* that tariff restrictions on resale and sharing were unlawful. On January 12, 1977, the Commission released its *Order on Reconsideration*, which, apart from modifications not relevant here, denied the petitions for reconsideration and reaffirmed the principal conclusions of the *Initial Order*.⁹

In its orders, the Commission defined "resale" as an activity in which a person subscribes to the communications services and facilities of a carrier and reoffers all or part of them to others for a profit.¹⁰ The Commission defined "sharing" as a nonprofit arrangement in which several persons collectively use communications services and facilities provided by a carrier, with each user paying the communications-related costs associated therewith according to its pro rata use of the services and facilities.¹¹

⁸ The Commission also concluded that resellers of communications services are communications common carriers as defined in Title II of the Communications Act, 47 U.S.C. §§ 201-222, and must as a matter of law be subjected to economic regulation under Title II. IBM's petition for review in No. 77-4067 challenges that legal conclusion. The Commission's ruling on that issue does not affect the validity of its determination that all tariff restrictions on resale and sharing are unlawful and should be discontinued.

⁹ On February 14, 1977, AT&T filed an extensive brief with the Commission in support of a motion for a stay of the orders pending judicial review. The Commission denied AT&T's motion in a Memorandum Opinion and Order, 77-159, released on March 14, 1977, 1 J.A. 173.

¹⁰ *Initial Order*, 60 F.C.C.2d at 263, 271-74, 1 J.A. 31, 41-46.

¹¹ *Id.*, 60 F.C.C.2d at 263, 274-76, 1 J.A. 31, 46-47.

The Commission considered what effects unlimited resale and sharing might be expected to have and forecast the development of a "two-tiered" interstate telecommunications industry.¹² The "first tier" would be composed of regulated carriers, such as the existing telephone companies, which would provide the transmission facilities and offer basic transmission services both to consumers and to other communications companies. The "second tier" would be composed of resellers, who would not generally provide transmission facilities but would obtain transmission services from the regulated first-tier carriers and then reoffer those services to the public. In reoffering the communications services, the resellers might perform merely a "retailer" function of purchasing the services in bulk and dividing them into smaller units desired by consumers, or they might combine the resold communications service with other services, such as data processing.¹³ Sharing arrangements among communications users would enable these users to achieve economies through cooperative efforts.

The Commission concluded that the public would benefit substantially from the elimination of restrictions on resale and sharing. In particular, the Commission discussed in detail its conclusions that increased resale and sharing would encourage better management of communications networks;¹⁴ would provide specialized management expertise both to the using public and to the carriers;¹⁵ would "create further pressures on carriers to provide their services at rates which are wholly related to costs";¹⁶ and would heighten competition among

¹² *Id.*, 60 F.C.C.2d at 300, 1 J.A. 80.

¹³ *Id.*, 60 F.C.C.2d at 272-74, 1 J.A. 42-46.

¹⁴ *Id.*, 60 F.C.C.2d at 299, 1 J.A. 79.

¹⁵ *Id.*, 60 F.C.C.2d at 300, 1 J.A. 80.

¹⁶ *Id.*, 60 F.C.C.2d at 298-99, 1 J.A. 78-79.

those providing communications services, thereby creating additional incentives for research and development.¹⁷

The Commission's orders discussed at length the theories and arguments offered in the comments submitted by the parties, many of whom opposed unlimited resale and sharing. In concluding that the restrictive tariff provisions were unreasonable and unlawfully discriminatory, the Commission considered and rejected arguments by AT&T and GTE Service Corporation that removal of the restrictions would have harmful effects. Those carriers urged that unrestricted resale and sharing would (1) interpose an undesirable middleman between the communications carriers and the public; (2) lead to unfair competition and other discriminatory behavior; and (3) adversely affect the carriers' rate structures and revenues.¹⁸

The Commission also analyzed at length AT&T's arguments relating to its Telpak bulk private line service;¹⁹ and it devoted extensive discussion to an economic impact study submitted by AT&T in the course of the proceedings.²⁰ The Commission's *Initial Order* contained an appendix that considered the many and diverse comments filed with respect to the "single customer provisions" of the carriers' tariffs.²¹

¹⁷ *Id.*, 60 F.C.C.2d at 302, 1 J.A. 82-83.

¹⁸ *Id.*, 60 F.C.C.2d at 282-83, 1 J.A. 57-58; *Order on Reconsideration*, 62 F.C.C.2d at 594-98, 1 J.A. 160-65.

¹⁹ *Initial Order*, 60 F.C.C.2d at 285-89, 1 J.A. 61-65.

²⁰ *Id.*, 60 F.C.C.2d at 291-93, 1 J.A. 68-70; *Order on Reconsideration*, 62 F.C.C.2d at 592, 596-97, 1 J.A. 158, 162-64.

²¹ Appendix E, "Single Customer Provisions," *Initial Order*, 60 F.C.C.2d at 330-36, 1 J.A. 127-40. Those provisions allowed limited exceptions to the prohibitions on resale and sharing.

Proceedings Before This Court

Six petitions to review the Commission's orders have been consolidated in this proceeding. These petitions were filed by AT&T (No. 77-4057), IBM (No. 77-4067), Securities Industry Automation Corp. (No. 77-4068), United System Service, Inc. (No. 77-4073), Telenet Communications Corp. (No. 77-4074), and Aeronautical Radio, Inc. and Air Transport Association of America (No. 77-4075).²² A motion by AT&T for a stay of the Commission's orders pending judicial review was denied by this Court on March 22, 1977.

SUMMARY OF ARGUMENT

The notice and comment rulemaking procedure used by the Commission was the correct procedure under the Administrative Procedure Act ("APA") and the Communications Act. The APA establishes notice and comment as the normal procedure in a rulemaking, and requires a trial-type hearing only where the statute involved specifically requires that a decision be made "on the record." *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). Because Section 205(a) of the Communications Act contains no such requirement, this case does not come within the APA's narrow exception to normal rulemaking procedures. Further, the courts have recognized that the notice and comment procedure is particularly appropriate for rulemakings such as this one in which the agency considers the formulation of new policies of prospective, industry-wide application.

²² The last three petitions were filed in the District of Columbia Circuit and transferred to this Court pursuant to 28 U.S.C. § 2112(a). Securities Industry Automation Corp., petitioner in No. 77-4068, has filed a "Statement in Lieu of Petitioner's Brief," in which it indicates that it will file a brief only as an intervenor in support of the respondents.

The Commission's *Initial Order* and *Order on Reconsideration* cannot be found to be "arbitrary, capricious or an abuse of discretion," the controlling standard under the APA. To the contrary, the Commission fully considered the factors relevant to its decision and articulated a rational connection between the facts found and the choices it made.

ARGUMENT

I. THE NOTICE AND COMMENT RULEMAKING PROCEDURE USED BY THE COMMISSION WAS AUTHORIZED BY LAW AND WAS THE APPROPRIATE PROCEDURE FOR THE PROMULGATION OF THESE POLICIES.

Section 205 of the Communications Act authorizes the Commission to prescribe the rates and practices of communications common carriers if it finds that they are operating in a manner violative of the Act. 47 U.S.C. § 205(a). In this proceeding, the Commission concluded that the carriers' existing tariff restrictions on shared use and resale were unreasonable and unlawfully discriminatory. Pursuant to Section 205, the Commission ordered the carriers to file new tariffs that would eliminate those defects by providing for unlimited sharing and resale.

We do not understand AT&T to challenge here the Commission's conclusion that the previous tariff provisions were unlawful. Rather, AT&T argues that it was entitled to a trial-type hearing before the Commission could prescribe any new practices to remedy the unlawful situation, and that the extensive notice and comment proceedings held were legally inadequate.²³

²³ AT&T Brief at 20-48. The other carrier petitioner, United System Service, Inc. does not challenge the procedure followed by the Commission. It challenges only the Commission's conclusion that sharers of communications services need not be regulated as common carriers. See note 93 *infra*.

AT&T's attack on the notice and comment procedure used by the Commission is groundless. The Commission gave careful consideration to the question whether an evidentiary hearing was necessary or appropriate here, and its conclusion on the question is plainly correct. As the Commission pointed out, recent Supreme Court decisions make clear that neither Section 205(a) of the Communications Act nor the Administrative Procedure Act ("APA") required the Commission to conduct a trial-type hearing in this proceeding.²⁴ Both the Supreme Court and this Court have confirmed that the notice and comment procedure is permissible and appropriate in rulemaking proceedings which formulate new policies of prospective, industry-wide application.

**A. Neither Section 205(a) of the Communications Act
Nor the Administrative Procedure Act Required
that a Trial-Type Hearing Be Conducted in the
Resale and Shared Use Proceeding.**

The Commission conducted the resale and shared use proceeding in accordance with the standard rulemaking procedures established by the APA. Specifically, the Commission fully complied with the requirement of Section 553 that it "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation."²⁵

Petitioner AT&T argues that the resale and shared use proceeding came within an exception to Section 553 and that therefore the Commission should have applied the trial-type hearing procedures of Sections 556 and 557.²⁶ The narrow exception in Section 553, to which

²⁴ *Initial Order*, 60 F.C.C.2d at 325-30, 1 J.A. 117-26.

²⁵ 5 U.S.C. § 553(c).

²⁶ 5 U.S.C. §§ 556, 557.

AT&T refers, provides that "[w]hen rules are required by statute to be made *on the record* after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection."²⁷ AT&T argues that the requirement of a "full opportunity for hearing" in Section 205(a) of the Communications Act amounts to a statutory requirement that the rules be made "on the record" pursuant to Sections 556 and 557, with a trial-type hearing.

AT&T's claim that the "statutory requirement" language of Section 553 requires a trial-type hearing in the resale case flies in the face of recent Supreme Court decisions.²⁸ Most clearly dispositive is *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), where the Supreme Court held that the appellant railroad had not been prejudiced by the failure of the Interstate Commerce Commission ("ICC") to hold trial-type hearings as a part of its rulemaking procedure for establishing new industry-wide rates for certain freight car uses. The ICC was authorized to establish such rates by Section 1(14)(a) of the Interstate Commerce Act, which instructed the ICC to act "after hearing."²⁹ The Court held that a requirement that the ICC act "after hearing" was not a requirement to act "on the record after opportunity for an agency hearing," as that language is used in the exception in Section 553.

The Supreme Court in *Florida East Coast* ruled that a statutory requirement of a "hearing" does not "necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to

²⁷ 5 U.S.C. § 553(c) (emphasis added).

²⁸ *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). Cf. *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

²⁹ 49 U.S.C. § 1(14)(a).

present oral argument to the agency's decisionmaker."³⁰ In other words, such a requirement does not in itself trigger the strict adjudicatory hearing procedures of Sections 556 and 557. Rather, those procedures are necessary only where the statute also expressly requires a ruling "on the record," or where it contains equivalent language clearly indicating that Congress intended to require a trial-type hearing. Absent a requirement that the agency act "on the record," the Court held that no trial-type hearing is required in an agency rulemaking proceeding. Since Section 205(a) of the Communications Act contains no such language, *Florida East Coast* makes clear that no trial-type hearing was required in the resale proceeding.

The foundation for *Florida East Coast* and the many decisions following it is the absence of any necessity for a trial-type hearing in a rulemaking proceeding such as this one. Where, as in most rulemakings, an agency is not required to act "on the record," it is permitted to draw on its own expertise on the subject in formulating policies to effectuate its legislative mandate.³¹ The role of hearings in such a proceeding is to allow the agency to learn the views of interested persons who will be affected by its new policies. *Florida East Coast* holds that a requirement of a "hearing" in such instances is satisfied by a notice and comment procedure in which interested persons have an opportunity to state their views in writing. That is precisely what occurred here.

AT&T argues that *Florida East Coast* is limited to Section 1(14)(a) of the Interstate Commerce Act.³² To

³⁰ 410 U.S. at 240.

³¹ E.g., *California Citizens Band Ass'n v. United States*, 375 F.2d 43, 54 (9th Cir.), cert. denied, 389 U.S. 844 (1967); *WBEN, Inc. v. United States*, 396 F.2d 601, 613 (2d Cir.), cert. denied, 393 U.S. 914 (1968).

³² AT&T Brief at 24-25.

the contrary, as other courts have recognized, *Florida East Coast* enunciated a general rule for determining when an agency must conduct a formal trial-type hearing under Sections 556 and 557, instead of following the Section 553 notice and comment procedure, in a legislative-type rulemaking proceeding. That rule has been followed by courts interpreting diverse statutes far removed from the Interstate Commerce Act provision involved in *Florida East Coast*. See, e.g., *American Public Gas Ass'n v. FPC*, 498 F.2d 718 (D.C. Cir. 1974) (*per curiam*) (interpreting Sections 16 and 17 of the Natural Gas Act, 15 U.S.C. §§ 717o, 717f); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973) (interpreting the Natural Gas Act); *Bell Telephone Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (interpreting Section 201(a) of the Communications Act). It is unsound to argue that the "on the record" rule is confined to one section of the Interstate Commerce Act.³³

AT&T offers three cases in support of its attempt to confine the import of *Florida East Coast*. First, it quotes from a 1913 decision, *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88 (1913), decided some thirty years before enactment of the APA.³⁴ The Supreme Court in *Florida East Coast* itself explained why *Louisville* has no bearing

³³ AT&T also suggests that *Florida East Coast* is distinguishable because the ICC there had issued a draft of its proposed order and allowed the parties to comment on it. AT&T Brief at 25 n.26. In this proceeding, the same function was served when the Commission entertained extensive petitions for reconsideration after its *Initial Order*. Moreover, the Commission's decision did not depart in any respect from the issues identified in its initial *Notice*. A reconsideration procedure provides adequate means of obtaining the parties' views even where the Commission had failed to provide any notice or opportunity for comment before it issued a decision. *Banzhaf v. FCC*, 405 F.2d 1082, 1104 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

³⁴ AT&T Brief at 23-24. The APA was originally enacted in 1946. 60 Stat. 237, June 11, 1946, as amended, 5 U.S.C. § 551 *et seq.*

on the selection of procedures in a rulemaking: *Louisville* involved a "quasi-judicial" proceeding, in which the agency adjudicated a specific dispute between two parties, rather than a "legislative-type" policy decision of prospective, nationwide application.³⁵ Further, the *Louisville* decision was based on the Due Process Clause and on generalized principles of pre-APA administrative law.³⁶ No claim has been or can be made that due process requires a trial-type hearing in a rulemaking proceeding; and the APA as construed in *Florida East Coast* makes any reference to pre-APA administrative law superfluous.³⁷

AT&T relies on *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973), selecting statements concerning the importance of evidentiary hearings.³⁸ But it fails to mention the court's conclusion in *Mobil* that *Florida East Coast* "virtually established . . . a touchstone test of when section 556 and section 557 proceedings are required." *Id.* at 1250. The *Mobil* court held that—

"*Florida East Coast* . . . is controlling on the narrow point of whether the Commission must rigorously comply with the standards of sections 556 and 557 of the APA. The Natural Gas Act does not on its face require that rates be made 'on the record' . . ." *Id.* at 1251.

³⁵ 410 U.S. at 244. The *Louisville* opinion is limited by its own terms to "administrative orders [that are] quasi-judicial in character . . ." 227 U.S. at 91.

³⁶ 227 U.S. at 90-94; see *United States v. Florida East Coast Ry.*, *supra*, 410 U.S. at 242.

³⁷ AT&T also refers briefly to *Morgan v. United States*, 298 U.S. 468 (1936). AT&T Brief at 24 n.23 & 25 n.26. AT&T implies that *Morgan* is a "significant" precedent because the statute under consideration there referred to a "full" hearing, as does Section 205(a) of the Communications Act. But *Morgan*, like *Louisville*, involved a quasi-judicial proceeding, 298 U.S. at 480, and was decided on constitutional and pre-APA administrative law grounds, *id.* at 477-82.

³⁸ AT&T Brief at 43-45.

Since the *Mobil* case held that the APA did not require an evidentiary hearing before the Federal Power Commission, that case hardly supports an argument that AT&T has a right to such a hearing before the FCC.

AT&T relies also on *Independent Bankers Ass'n v. Board of Governors*, 516 F.2d 1206 (D.C. Cir. 1975).³⁹ But the court in *Independent Bankers* stressed that the proceeding there under review, which focused on the merits of a single application submitted by one company, was "almost entirely adjudicative in character." *Id.* at 1217. The court expressly distinguished *Florida East Coast* because of "the essentially legislative nature of the determination" made there. *Id.* at 1218. Thus, *Independent Bankers* simply underscores the appropriateness of the application of the *Florida East Coast* rule to rule-making proceedings of general application, such as this one.

AT&T also argues at length that the requirement of a "full opportunity for hearing" in Section 205(a) of the Communications Act somehow compensates for the absence of any requirement in that Section that the Commission make its decision "on the record."⁴⁰ But a requirement that the opportunity for a hearing be "full" does not change the *type* of hearing that is appropriate; it merely directs the agency to ensure that the opportunity given to interested persons to present their views is adequate and not grudging. See *Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975) (upholding use of notice and comment procedure in rulemaking under Section 214 of the Communications Act, 47 U.S.C. § 214,

³⁹ AT&T Brief at 45-46.

⁴⁰ AT&T Brief at 41-46.

which requires a "full opportunity for hearing").⁴¹ The type of hearing the Commission afforded here was clearly appropriate in view of the nature of the issues presented, regardless of what type of hearing the Constitution or a statute might require where the issues relate to past conduct or involve only a single entity.⁴² In this instance, the hearing afforded AT&T and other parties was "full" by any measure. The Commission called for three successive rounds of comments, and it later entertained lengthy petitions for reconsideration. AT&T submitted over 275 pages of material to the Commission in this proceeding.

⁴¹ *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955), cited in AT&T's Brief at 41 n.39, is not to the contrary. Like *Morgan and Louisville*, it involved an agency determination that was adjudicatory in nature, since it was a licensing proceeding that had been designated for a hearing by the Commission. Such proceedings are declared by the APA to be adjudicatory; and trial-type hearings are required by the Communications Act. See 5 U.S.C. §§ 551(6) & (7); 47 U.S.C. § 409.

⁴² Indeed, even in an adjudicatory context, a requirement of a "full hearing" does not mean that trial-type hearings must be held where a decision does not turn on issues of adjudicative fact requiring evidentiary resolution. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). The Supreme Court there held that the Commission may, in appropriate circumstances and pursuant to a general substantive rule, deny applications without a trial-type hearing, despite the fact that Section 309(b) of the Communications Act requires that applicants be granted a "full hearing." The Court observed that "[w]e do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." *Id.* at 205. See also *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973). That principle applies *a fortiori* to the rulemaking proceeding involved here. Having initially reserved the question of whether to have a trial-type hearing, *Notice of Inquiry and Proposed Rule-making, supra*, 47 F.C.C.2d at 658-59, 1 J.A. 26-27, the Commission determined that trial-type proceedings were unnecessary, because the record provided by the three rounds of written comments submitted by 43 parties was adequate for the resolution of the generalized issues presented. *Initial Order*, 60 F.C.C.2d at 262, 1 J.A. 29-30.

AT&T bases much of its argument on two decisions by this Court, *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1971) ("the *Telpak* case"), and *National Ass'n of Motor Bus Owners v. FCC*, 460 F.2d 561 (2d Cir. 1972) ("the *Motor Bus Owners* case"). Both of these cases were decided before *Florida East Coast*, and neither of them in fact supports AT&T's argument.

In the *Telpak* proceeding, the Commission found that the tariff provisions of those carriers that permitted certain categories of customers to share a particular bulk private line service ("Telpak") were unlawfully discriminatory. AT&T asserts that the *Telpak* case is "indistinguishable" from this case, because the Commission tried "to achieve results that were identical to those involved here . . . on the basis of the same procedural shortcuts that were used in this case."⁴³ Even a cursory examination of the *Telpak* opinion reveals that this comparison is not accurate.

The *Telpak* appeal did not even raise the issue of a right to a Section 556 and 557 hearing that AT&T presses here. In the *Telpak* proceeding, the Commission had held twenty-seven days of trial-type hearings and had allowed oral argument on its proposed order.⁴⁴ Thus, the Court in *Telpak* had no cause to—and did not—overturn the Commission's decision for failure to have a trial-type hearing, as AT&T asks this Court to do here.⁴⁵

⁴³ AT&T Brief at 26-27.

⁴⁴ *AT&T v. FCC*, *supra*, 449 F.2d at 446.

⁴⁵ AT&T claims nonetheless that the *Telpak* case established that "a prescription of practices or rates can be validly ordered only if the Commission has first conducted evidentiary hearings. . . ." AT&T Brief at 22. No such statement appears in the Court's opinion in the *Telpak* case. AT&T's argument is that the Court must have meant to say something of this sort, because a later case indicated that the *Telpak* prescription was reversed in part for failure to hold an evidentiary hearing. AT&T Brief at 22 n.21, *citing Motor Bus Owners*, 460 F.2d at 564. In fact, the Court in the latter

Instead, the Court reversed the Commission's prescription of Telpak practices because the Commission's findings were inadequate to support them, as the Commission itself had tacitly admitted by failing to make the statutorily required finding that the prescribed practices would be "just, fair, and reasonable."⁴⁶

AT&T's reliance on the *Motor Bus Owners* case is similarly misplaced. The requirement of a trial-type hear-

case said only that Section 205(a) required a full opportunity for a hearing and that in the *Telpak* proceeding "no such hearing had been held" In view of the obvious fact that evidentiary hearings *had* been held, the Court's statement in *Motor Bus Owners* presumably relates not to the *type* of hearing the Commission afforded but to the sufficiency (or "fullness") of the parties' opportunity to express their views. As we have shown, the hearing afforded here was "full" by any measure.

⁴⁶ *AT&T v. FCC*, *supra*, 449 F.2d at 447-48. AT&T argues (Brief at 49-52) that the Commission has failed in this case to make the findings required by Section 205(a). That section requires the Commission to find that its prescribed practices are "just, fair, and reasonable." 47 U.S.C. § 205(a). The Commission explicitly found that unlimited sharing and resale are "just and reasonable," 60 F.C.C.2d at 283, 289, 321, 1 J.A. 58, 65, 109. The *Initial Order* also devoted considerable discussion to the fairness of its prescribed practices, *e.g.*, 60 F.C.C.2d at 298-99, 310-11, 1 J.A. 78-79, 94-96. Although the findings do not include the precise word "fair," it would be an exercise in formalism to hold that they fail to meet the requirements of Section 205(a) for that reason. *See Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975).

The Commission was not engaged in prescribing rates in the resale proceeding, and so did not have to make the statutory finding required for rate prescription. As the Commission has explained, AT&T's reliance on *AT&T v. FCC* to prove that rates were prescribed in this proceeding misinterprets the facts of that case. *Compare* AT&T Brief at 39-51 *with* *Order on Reconsideration*, 62 F.C.C.2d at 589-91, 1 J.A. 154-56. In any event, the courts have held that an agency is not required to conduct exhaustive studies of all possible economic impacts before taking action. The Commission is entitled to make "reasonable assumptions about economic impact based on the evidence currently available." *North Carolina Utilities Comm'n v. FCC*, No. 76-1002, slip op. at 45, 49 (4th Cir., March 22, 1977).

ing was simply not at issue in that case.⁴⁷ The Court referred to a trial-type hearing only in reciting the assumptions that the Commission had made about its own procedures in the order there under review. *Motor Bus Owners* did not reflect a judicial ruling on any issue relating to the nature of the hearing that was held.

Finally, AT&T's attempt to argue inconsistency with "previous actions of the Commission"⁴⁸ is also unpersuasive. AT&T conveniently overlooks the Commission's statements, in a number of recent proceedings, that trial-type proceedings are not necessary under hearing provisions similar to that involved here.⁴⁹ Instead, AT&T's argument is once again based solely on cases decided prior to *Florida East Coast*.⁵⁰ Even if the Commission's statements in the cases cited by AT&T represented the Commission's view at that time, "[t]he mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach."⁵¹

⁴⁷ The *Motor Bus Owners* case also stemmed from the *Telpak* proceeding. After its initial prescription was reversed by the Court in *AT&T v. FCC*, the Commission decided not to prescribe another remedy for the carriers' discriminatory *Telpak* sharing provisions, but merely to order the carriers to file tariff revisions remedying the situation. The Court in *Motor Bus Owners* held that this decision was within the Commission's administrative discretion.

⁴⁸ AT&T Brief at 28-30.

⁴⁹ E.g., *AT&T's High Density-Low Density Structure*, 45 F.C.C.2d 88, 89 (1974); *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 418-19, *aff'd*, *Bell Telephone Co. v. FCC*, 503 F.2d 1250 (3d Cir. 1974), *modified*, 56 F.C.C.2d 14 (1975); *Specialized Common Carrier Inquiry*, 29 F.C.C.2d 870, 926 (1971), *aff'd*, *Washington Utilities & Transportation Comm'n v. FCC*, *supra*.

⁵⁰ AT&T Brief at 28-29, *citing Telpak Sharing*, 31 F.C.C.2d 674 (1971); *AT&T*, 2 F.C.C.2d 173 (1965); *California Public Utilities Comm'n*, 4 P&F Rad. Reg.2d 498 (1965).

⁵¹ *Bell Telephone Co. v. FCC*, *supra*, 503 F.2d at 1265.

In sum, AT&T's contention that it was entitled to time-consuming trial-type proceedings is contradicted by overwhelming authority. The notice and comment procedure followed here fully satisfies the statutory requirement of a hearing.

B. The Courts Have Recognized the Appropriateness of Notice and Comment Procedures in Rulemaking Proceedings That Look Toward the Formulation of New Agency Policies of Industry-Wide, Prospective Application.

AT&T argues that the nature of the issues before the Commission in this case made evidentiary proceedings especially appropriate. AT&T says that the case involved "complex factual matters" and that the Commission's orders will have "far-reaching consequences."⁵² But, "[t]he fact that these questions are difficult and important . . . does not mean that an evidentiary hearing is an essential prerequisite to their satisfactory solution." *National Air Carrier Ass'n v. CAB*, 436 F.2d 185, 194 (D.C. Cir. 1970). It is precisely when an agency is faced with a broad policy question "that the agency *should be given* the greatest degree of latitude in conducting proceedings consonant with the goals of efficient decision-making and responsible 'public interest' administration." *Bell Telephone Co. v. FCC*, *supra*, 503 F.2d at 1267 (emphasis in original). In such instances, the agency should not be burdened unnecessarily with trial-type hearings, which tend to become interminable and unmanageable when the numerous parties each attempt to cross-examine multiple witnesses on the possible future effects of new policies.⁵³

⁵² AT&T Brief at 19-20.

⁵³ *Virgin Islands Hotel Ass'n (U.S.), Inc. v. Virgin Islands Water & Power Authority*, 476 F.2d 1263, 1268 (3d Cir.), cert. denied 414 U.S. 1067 (1973). See *Bell Telephone Co. v. FCC*, *supra*,

AT&T's argument also ignores what the Supreme Court has described as the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *United States v. Florida East Coast Ry.*, *supra*, 410 U.S. at 245. The significance of this distinction was stressed by this Court in a case involving a claimed right to a trial-type hearing before the Commission:

"Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. *But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.*"⁵⁴

WBEN is only one of numerous cases in which the courts of appeals have upheld the denial of trial-type hearings in agency rulemaking proceedings that look toward the development of new guidelines of industry-wide application.⁵⁵ In many of these cases, the courts

503 F.2d at 1266-67; *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 682-84 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). The *Telpak* proceedings, in which the Commission held evidentiary hearings and which was subject to two court challenges, lasted over five years.

⁵⁴ *WBEN, Inc. v. United States*, *supra*, 396 F.2d at 618 (emphasis added). See also H. Friendly, *Benchmarks* 72-73, 111-13, 143-48 (1967); K. Davis, *Administrative Law* § 6.06, at 379 (1958); *id.* § 6.05 at 274-75 (Supp. 1970).

⁵⁵ See, e.g., *Washington Utilities & Transportation Comm'n v. FCC*, *supra*; *Bell Telephone Co. v. FCC*, *supra*; *National Petroleum Refiners Ass'n v. FTC*, *supra*, 482 F.2d at 681-83; *Pacific and Southern Co. v. FCC*, 405 F.2d 1371 (D.C. Cir. 1968) (*per curiam*); *California Citizens Band Ass'n v. United States*, *supra*; *American*

rested their approval of the agencies' use of informal notice and comment procedures

"on a fundamental awareness that rulemaking is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rulemaking is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rulemaking."⁵⁶

These cases find their roots in Supreme Court decisions stressing the benefits of procedural flexibility in agency public interest determinations.⁵⁷ They also draw on the Supreme Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), which was reaffirmed by the Court in *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964). In *Storer*, the Court held that notwithstanding a statutory hearing requirement, the Commission retained the power to promulgate rules of general application and to deny an adjudicatory hearing to applicants submitting applications that on their face showed violations of the rules.

Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.) (*en banc*), cert. denied, 385 U.S. 843 (1966); *Air Line Pilots Ass'n International v. Quesada*, 276 F.2d 892 (2d Cir. 1960); *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954).

⁵⁶ *American Airlines, Inc. v. CAB*, *supra*, 359 F.2d at 629. The courts accord broad latitude to the agencies in establishing the procedures for their legislative-type rulemakings. See, e.g., *Bell Telephone Co. v. FCC*, *supra*, 503 F.2d at 1266-68. They recognize that "[n]on-evidentiary rulemaking permits broad participation in the decision-making process and enables an administrative agency to develop integrated plans in important policy areas." *Id.* at 1265.

⁵⁷ E.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968); *United States v. Florida East Coast Ry.*, *supra*; see *Bell Telephone Co. v. FCC*, *supra*, 503 F.2d at 1265.

There can be no question that the Commission's resale proceeding was a classic instance of rulemaking, as opposed to adjudication. The Commission's orders apply to *all* communications carriers offering any type of private line services, and to all resellers and sharers of private lines, not just to the parties to the resale proceeding.⁵⁸ Further, these orders are of prospective application only, and do not purport to settle past disputes or disagreements.⁵⁹

The types of "factual matters" that were before the Commission in the resale proceeding were entirely unsuited to a trial-type hearing. The principal issues underlying the Commission's policy decision involved predicting the possible future effects of resale and sharing on the development of telecommunications—the possible benefits to consumers, and the possible changes in the roles of the regulated carriers and unregulated entities.⁶⁰

⁵⁸ Indeed, the resale proceeding was not limited to private line services but encompassed initially all types of telephone service. However, the parties' comments focused primarily on private line services, and the Commission decided to confine its new policy to those services, at least for the time being. *Initial Order*, 60 F.C.C.2d at 289-91, 1 J.A. 66-67.

AT&T argues that its tariffs and facilities are actually the principal focus of the resale proceeding, and that this case does not really involve industry-wide issues. AT&T Brief at 33-35. The error in this argument is demonstrated by the fact that at least 14 entities have filed revised tariffs pursuant to the Commission's orders in the resale proceeding.

⁵⁹ The essentially legislative nature of such a proceeding is not destroyed merely because some parties' rights will be significantly affected by the new agency policy, as AT&T argues that its rights will be affected by the resale and sharing decision. AT&T Brief at 62. Agencies are permitted to use rulemaking procedures, without a trial-type hearing, even when important preexisting rights are substantially affected by the rule in question. *Air Line Pilots Ass'n International v. Quesada*, 276 F.2d 892 (2d Cir. 1960); *Transcontinent Television Corp. v. FCC*, 308 F.2d 339 (D.C. Cir. 1962).

⁶⁰ See *Initial Order*, 60 F.C.C.2d at 298-303, 272-74, 1 J.A. 78-83, 42-46; AT&T Brief at 55-60.

Those issues involve what the courts and respected commentators have recognized as "legislative" rather than "adjudicative" facts.⁶¹ It is quixotic to ask that issues of legislative fact—particularly ones involving prediction of future consequences—be determined with the same degree of certainty, or by the same procedures, as the questions involved in an adjudication.

A trial-type hearing on these issues would not, as AT&T suggests, bring certainty to the Commission's pre-

⁶¹ See K. Davis, *Administrative Law* § 7.02 at 413 (1958), quoted in *Bell Telephone Co. v. FCC*, *supra*, 503 F.2d at 1268; *American Airlines, Inc. v. CAB*, *supra*, 359 F.2d at 633. Professor Davis explains that "[a]djudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." K. Davis, *supra*.

Indeed, AT&T's position here is surprising in view of the position it has taken in *MCI Telecommunications Corp. v. FCC*, No. 75-1635 (D.C. Cir.), where it actively sought and is supporting in court the Commission's rejection of another carrier's tariff provisions without a hearing, despite the existence of disputed issues of adjudicative fact. (AT&T argues that no such issues exist, but that view is hotly contested by the other carrier.) AT&T's brief in the *MCI* case contends that, "It is well settled that briefing and oral argument constitute a hearing unless there are disputed issues of adjudicative fact material to a solution of the dispute." Moreover, it relies on *Bell Telephone Co. v. FCC*, *supra*, in which the court—rejecting a claim by AT&T similar to the one it makes here—declared that legislative facts "obviously do not require adjudicatory proceedings." Further, *Bell Telephone* squarely rested on the *Florida East Coast* case in holding that a statutory requirement for a hearing is not a requirement for an evidentiary hearing. 503 F.2d at 1268; see Brief for AT&T at 42 in *MCI Telecommunications Corp. v. FCC*, *supra*. Yet AT&T argues in this case that the Commission unlawfully denied it a trial-type hearing where only legislative issues such as those that *Bell Telephone* held did not require a hearing are presented. Thus, the statutory "full opportunity for hearing" language which AT&T regards as requiring an evidentiary hearing in this case is equally earnestly argued by AT&T not to require a trial-type hearing in the *MCI* case.

dictions. It would only guarantee lengthy delay before the Commission could implement its new policy.⁶² To accept AT&T's argument would produce, in Judge Friendly's words, "an unhappy state of affairs wherein efforts by parties, agencies, and courts to attain an unattainable certainty result in such giant delays as to produce the worst of all possible worlds."⁶³

II. THE COMMISSION'S ORDERS ARE NOT ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION.

In its lengthy *Initial Order*, the Commission carefully set forth its analysis of the potential role of resale and sharing in the communications industry,⁶⁴ and of the public benefits that it foresees as the result of removing the previous restrictions.⁶⁵ It also gave full consideration to the arguments and objections raised by the parties who submitted comments,⁶⁶ with particular attention to those submitted by AT&T.⁶⁷ Yet AT&T argues that the Commission's orders are not based on a reasoned evaluation of their consequences and "lack a rational basis in the record."⁶⁸

AT&T's argument overlooks the fact that the Commission was engaged in this proceeding in formulating innovative, legislative-type rules of broad, prospective

⁶² See note 53 *supra*.

⁶³ *Penn Central Transp. Co.*, 384 F. Supp. 895, 931-32 n.72 (Spec. Ct. R.R.R.A. 1974).

⁶⁴ See, e.g., *Initial Order*, 60 F.C.C.2d at 266-68, 272-76, 1 J.A. 35-38, 42-47.

⁶⁵ See, e.g., *id.*, 60 F.C.C.2d at 298-303, 1 J.A. 78-83.

⁶⁶ See, e.g., *id.*, 60 F.C.C.2d at 270-71, 285-87, 289, 1 J.A. 40-41, 61-64, 66.

⁶⁷ See, e.g., *id.*, 60 F.C.C.2d at 282-83, 288-89, 291-93, 1 J.A. 57-58, 64-65, 68-70.

⁶⁸ AT&T Brief at 52.

application. The Commission has properly recognized that after its new policies have been in effect for a time, it may be necessary to revise them in the light of experience.⁶⁹ The courts have relied on such agency flexibility in upholding the use of notice and comment rulemaking. *United States v. Florida East Coast Ry.*, *supra*, 410 U.S. at 241-42; *American Airlines, Inc. v. CAB*, *supra*, 359 F.2d at 633.⁷⁰ The deference that the courts have shown to legislative rulemakings is based on the difficult policy judgments that necessarily underlie legislative-type rules. These judgments are often made on the basis of predictions of future consequences, and there is no certain way to determine whether such predictions are in fact correct. As Judge Leventhal has said, an issue of legislative fact is

"the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings."⁷¹

If an agency has expressed its willingness to adjust its rules as experience may dictate, the courts should allow it the opportunity to obtain that experience.

Because the Commission properly employed a notice and comment procedure under Section 553, this Court's review is governed by Section 706(2)(A) of the APA.⁷²

⁶⁹ *Initial Order*, 60 F.C.C.2d at 307-08, 1 J.A. 91-92; *Order on Reconsideration*, 62 F.C.C.2d at 597, 1 J.A. 163.

⁷⁰ In contrast, in a case in which the Commission refused to allow a period in which it could gain some further experience before promulgating its rules, the court refused to give the Commission the "benefit of the doubt" normally accorded to such agency decisions. *Home Box Office, Inc. v. FCC*, No. 75-1280, slip op. at 53-54 n.60 (D.C. Cir., March 25, 1977).

⁷¹ *American Airlines, Inc. v. CAB*, *supra*, 359 F.2d at 633 (emphasis added).

⁷² 5 U.S.C. § 706(2)(A). See *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 700 (2d Cir.), cert. denied, 423 U.S. 827 (1975).

Consequently, the Court may set aside the Commission's findings or conclusions only if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard of review does not allow a court to substitute its judgment for that of the agency.⁷³

The minute dissection of the record and evaluation of evidence urged by AT&T⁷⁴ have already been performed by the Commission and go far beyond the scope of review in a rulemaking proceeding of this kind. The Commission's decision must, of course, provide a statement of its reasons that is sufficiently detailed to permit judicial review.⁷⁵ But the APA requires only that the Commission include in its rules "a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). Given the Commission's exhaustive recital of its reasoning in this proceeding, there can be no question that these requirements have been satisfied here. Thus, this Court's review of the substance of the Commission's decision should properly be limited to two questions: (1) whether the agency's decision was based on a consideration of the relevant factors;⁷⁶ and (2) whether the agency articulated a "rational connection between the facts found and the choice made."⁷⁷ Those tests are abundantly satisfied by the Commission's exhaustive orders.

⁷³ *E.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁷⁴ AT&T Brief at 52-60.

⁷⁵ *National Nutritional Foods Ass'n v. Weinberger*, *supra*, 512 F.2d at 701.

⁷⁶ *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, 401 U.S. at 416.

⁷⁷ *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Since *Burlington* was an adjudicatory proceeding, the standard that it articulated is, if anything, more stringent than the standard of review appropriate in the present rulemaking proceeding.

The Commission demonstrably based its decision on the relevant factors. As explained in its *Initial Order*, the restrictive resale and sharing provisions in the carriers' tariffs were lawful only if shown to be just and reasonable under Section 201(b) of the Communications Act.⁷⁸ In addition, the restrictions imposed by the tariff provisions were obviously discriminatory, and that discrimination was unlawful unless shown to be just and reasonable under Section 202(a).⁷⁹ In concluding that the tariff restrictions were not just and reasonable and were unlawfully discriminatory, the Commission discussed not only the applicable legal precedents,⁸⁰ but also the impact of its orders on all relevant interests—the carriers,⁸¹ the telecommunications industry,⁸² and the using public.⁸³ AT&T does not suggest what other relevant factors the Commission could or should have considered. Nor does it suggest that the Commission considered any factors that were demonstrably irrelevant or beyond its jurisdiction.

The Commission's orders satisfy the requirement of articulating a rational connection between the facts found and the choices made. The *Initial Order* carefully explained the Commission's findings as to the economic impact and practical effects of removing the tariff restrictions on resale and sharing; and it explained how the Commission had applied the appropriate legal standards.⁸⁴

⁷⁸ 47 U.S.C. § 201(b); see *Initial Order*, 60 F.C.C.2d at 280-82, 1 J.A. 54-58.

⁷⁹ 47 U.S.C. § 202(a); see *Initial Order*, 60 F.C.C.2d at 280-82, 1 J.A. 54-58.

⁸⁰ See, e.g., *Initial Order*, 60 F.C.C.2d at 280-82, 283-85, 1 J.A. 54-58, 58-60.

⁸¹ See, e.g., *id.*, 60 F.C.C.2d at 282-83, 299-300, 302, 1 J.A. 54-58, 78-80, 82-83.

⁸² See, e.g., *id.*, 60 F.C.C.2d at 282-83, 300-02, 1 J.A. 54-58, 80-83.

⁸³ See, e.g., *id.*, 60 F.C.C.2d at 282-83, 298-303, 1 J.A. 54-58, 78-83.

⁸⁴ See, e.g., *id.*, 60 F.C.C.2d at 282-85, 298-303, 1 J.A. 57-60, 78-83.

The Commission's conclusion that the restrictions should be removed was well within its informed discretion.

AT&T's objections to the Commission's orders boil down to a complaint that the Commission was not persuaded by AT&T's arguments.⁸⁵ AT&T principally attacks the Commission's findings concerning the economic impact of eliminating the resale and sharing restrictions.⁸⁶ The Commission responded at length to AT&T's economic arguments in its *Initial Order*, and detailed its reasons for finding them unpersuasive.⁸⁷ To be sure, the Commission did not and could not determine with certainty what would occur in the future. In predicting the long-range economic impact of such a change in regulatory policy, there are no certain answers. Predictions and "educated guesses are a necessary part of the Commission's job."⁸⁸ In making such predictions, the Commis-

⁸⁵ See AT&T Brief at 52-60.

⁸⁶ See *id.* at 53-59.

⁸⁷ See, e.g., *Initial Order*, 60 F.C.C.2d at 291-93, 1 J.A. 68-70. The Commission explained that AT&T's economic study was methodologically defective and was based on the incorrect assumption that resale and sharing restrictions would be eliminated on WATS as well as private line service. *Id.*, 60 F.C.C.2d at 291-92, 1 J.A. 68. AT&T also failed to consider the favorable revenue effects of customer shifts from one type of AT&T service to another in response to the new rules. *Id.*, 60 F.C.C.2d at 291, 1 J.A. 68. The Commission reasonably concluded that AT&T had not shown a revenue impact so substantial as to warrant retention of the tariff restrictions. *Order on Reconsideration*, 62 F.C.C.2d at 592, 596-97, 1 J.A. 158, 162-64. In this circumstance, the Commission properly decided to go forward with its decision and to revise that decision later in the light of experience, if revisions prove to be warranted. See text at notes 69-71 *supra*.

⁸⁸ *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671, 681-82 (D.C. Cir.), *cert. denied*, 395 U.S. 979 (1969). *Pikes Peak* upheld a Commission action authorizing a cable television corporation to commence operations in Colorado, after concluding that "[w]e are satisfied that the Commission gave petitioners' predictions a hard look." 422 F.2d at 682. See also, *American Airlines, Inc. v. CAB*, *supra*; *American Airlines, Inc. v. CAB*, 192 F.2d 417 (D.C. Cir. 1951).

sion is not required to conduct exhaustive studies of all possible economic impacts before taking action. "Such a requirement would hamstring administration at every juncture of the policy-making and implementation process."⁸⁹ The Commission is entitled to make "reasonable assumptions about economic impact based on the evidence currently available."⁹⁰ On such "legislative facts," the agency's view, once it has rationally considered the arguments, is controlling.

Finally, AT&T complains that the Commission has charted a policy opposed by the majority of the comments submitted to it.⁹¹ But agency rulemaking is not decided by a show of hands. The Commission has a statutory duty to promote the public interest,⁹² and it must make its own determination of how best to carry out that charge.⁹³

⁸⁹ *North Carolina Utilities Comm'n v. FCC*, No. 76-1002, slip op. at 45 (4th Cir., March 22, 1977).

⁹⁰ *Id.* at 49.

⁹¹ AT&T Brief at 53-55.

⁹² 47 U.S.C. § 151.

⁹³ Two petitioners before this Court, Telenet Communications Corporation and United System Service, Inc., challenge the Commission's decision that persons engaged in sharing arrangements should not be regulated as common carriers. Their principal argument is that unregulated sharing will provide a loophole through which resellers will attempt to escape regulation. That concern is unfounded. A theoretical possibility of abuse is not a reason to forbid legitimate sharing. The Commission made clear that it will be alert to detect any attempts by resellers to masquerade as sharing entities, and will take any actions that are necessary if abuses develop. *Initial Order*, 60 F.C.C.2d at 320, 1 J.A. 107-08. Cf. *United States v. Pacific Coast Wholesalers' Ass'n*, 338 U.S. 689 (1950). In any event, if IBM's argument as petitioner in case No. 77-4067 prevails (see note 8 *supra*), resellers would not be regulated as common carriers either, so resellers would have no incentive to seek to be classified as sharers.

CONCLUSION

For the foregoing reasons, the Commission's orders should be sustained to the extent that they declare unlawful and require removal of tariff restraints on the resale and sharing of transmission services by subscribers to communications common carrier services.⁹⁴

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⁹⁴ See note 8 *supra*.

APPENDIX A

STATUTES INVOLVED

Section 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a), provides:

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 553 of the Administrative Procedure Act, as amended, 5 U.S.C. § 553, provides:

§ 553. *Rule making*

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After

consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 556 of the Administrative Procedure Act, as amended, 5 U.S.C. § 556, provides:

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties;
- (7) dispose of procedural requests or similar matters;
- (8) make or recommend decisions in accordance with section 557 of this title; and
- (9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Section 557 of the Administrative Procedure Act, as amended, 5 U.S.C. § 557, provides:

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

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- (1) proposed findings and conclusions; or
- (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
- (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 706 of the Administrative Procedure Act, as amended, 5 U.S.C. § 706, provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

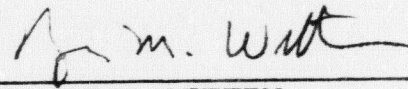
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CERTIFICATE OF SERVICE

I, Roger M. Witten, hereby certify that I served the "Brief for International Business Machines Corporation as Intervenor" by causing copies thereof to be sent by first class mail, postage prepaid, this 23d day of May, 1977, to the parties and intervenors listed below.



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